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Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-938

ALLSTATE INSURANCE COMPANY,
Petitioner,

vs.

LAVINIA HAGUE, Personal Representative of the Estate of RALPH ALVIN HAGUE, Deceased,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The opinion of the Minnesota Supreme Court is reported as Hague v. Allstate Insurance Co., 289 N.W.2d 43 (Minn. 1979).

QUESTIONS PRESENTED

The Respondent is dissatisfied with the form of the question presented by the Petitioner and suggests that the following is a more appropriate formulation.

I. Minnesota's laws and expressed public policy permit "stacking" of uninsured motorist coverage. Wisconsin's laws and public policy on this question are unclear. Is there present a true conflict of laws?

II. Is the United States Constitution violated when a state court looks to the law of the plaintiff's domicile in awarding benefits of an automobile insurance policy?

III. Does this case present an appropriate vehicle for exercise by the Supreme Court of its supervisory powers over the state courts' choice of law?

STATEMENT OF THE CASE

The parties presented to the Supreme Court an Agreed Statement of the Record which is set forth in Petitioner's Statement of the Case, and Respondent agrees with that portion of the Petititoner's Statement of the Case.

ARGUMENT

I. THIS CASE DOES NOT PRESENT THE COURT WITH A TRUE CONFLICT OF LAWS SINCE WISCONSIN'S LAWS AND PUBLIC POLICIES RELATING TO "STACKING" OF UNINSURED MOTORIST COVERAGE ARE UNCLEAR BUT MINNESOTA'S LAWS AND EXPRESSED PUBLIC POLICY PERMIT "STACKING".

The initial question in approaching conflict of laws problems is the determination whether a true conflict exists. There are two situations under which a true conflict will not be present. First, when the laws of the respective States are primarily the same for the factual circumstances presented. R. Leflar, *American Conflicts Law* 188 (3d ed. 1977). The second situation is when the governmental interests of one state in having its laws applied to the case greatly outweigh the respective governmental interests of the other state involved. *Id.* at 187.

Minnesota has expressed a strong governmental interest in permitting recovery of the maximum amount possible by permitting stacking of automobile insurance policies. *Van Tassel v. Horace Mann Ins. Co.*, 296 Minn. 181, 207 N.W.2d 348 (1973). In Wisconsin, the status of the right to stack automobile insurance policies is unclear. In this case the majority concluded that stacking would be impermissible under the laws of Wisconsin. *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 48 (Minn. 1979). Their decision was based upon the case of *Nelson v. Employers Mut. Cas. Co.*, 63 Wis.2d 558, 217 N.W.2d 670 (1974). As stated by the Minnesota Supreme Court in Hague:

> *The question of whether Wisconsin law permits excess insurance clauses and thus limits stacking is difficult be-*

> *cause the Wisconsin Supreme Court has never ruled on the same issue under the statute in force at the time this policy was written.* Neither the briefs nor arguments of counsel, however, persuade us that the Legislature or Supreme Court of Wisconsin would overrule the decision in *Nelson v. Employers Mutual Cas. Co., supra,* in which the court upheld the validity of such clauses. Thus, we find that Wisconsin law in effect at the time of the writing of the policy allowed "excess insurance" clauses and that stacking would not be permitted if Wisconsin law were to apply. [emphasis added]

289 N.W.2d at 48. The Respondent contends that the law of Wisconsin in respect to stacking insurance coverage is unclear since the Wisconsin Supreme Court in *Nelson* construed a version of Wisconsin law that was not in effect at the time the insurance policy was issued to Hague in 1974. In *Nelson* the Court construed the 1967 version of Section 204.30(5)(a) of the Wisconsin Statutes which was amended in 1973 through the addition of the following sentence:

> The uninsured motorist bodily injury coverage limits provided in an automobile liability or motor vehicle liability policy of insurance as required in this subsection shall not be reduced by the terms thereof to provide the insured with less protection than would be afforded him if he were injured by a motorist insured under an automobile liability or motor vehicle liability policy of insurance containing limits provided in this subsection.

Wis. Stat. §204.30(5)(a) (1973). Although *Nelson* did not involve the amended Statute, the Wisconsin Supreme Court in *dicta* expressed no opinion as to whether stacking is per-

missible under this version of the Statute. 63 Wis.2d at 569, 217 N.W.2d at 675. In addition the Court in *Nelson* recognized the fact that the national trend is to allow stacking of auto insurance policies. *Id.* at 563, 217 N.W.2d at 673.

In conclusion, if Wisconsin law had been applied to this action (whether by a Minnesota court or by a court in Wisconsin), it is not clear whether stacking of insurance benefits would have been permitted. It is clear that no expressed intent of the Wisconsin Legislature and no discernible interest of the state of Wisconsin is opposed to stacking in the circumstances of the present case. In the absence of a clear conflict the respondent submits that it would be inappropriate for this court to address the constitutional issues raised by the petitioner.

II. THE APPLICATION OF THE LAW OF THE PLAINTIFF'S DOMICILE DOES NOT VIOLATE THE UNITED STATES CONSTITUTION IN THE CIRCUMSTANCES OF THIS CASE.

This Court hitherto has declined to develop a detailed set of constitutionally derived standards which States must follow in resolving conflict of law issues involving insurance coverage. Instead, this Court has resolved the issue on a case-by-case basis under which each factual situation is examined in light of the Due Process and Full Faith and Credit Clauses of the Constitution.

A. THE PRESENT CASE COMES WITHIN THE PERMISSIBLE AMBIT OF STATE CHOICE OF LAW.

In *Clay v. Sun Insurance Office, Ltd.*, 377 U.S. 179 (1964), this Court recognized that insurance contracts involving multi-state coverage, upon which suit may be brought in one of several states, may be subject to the laws of any one of the states involved. Justice Douglas speaking for the Court and quoting from Justice Black's previous dissenting opinion in *Clay I stated:*

> Insurance companies, like other contractors, do not confine their contractual activities and obligations within the state boundaries. They sell to customers who are promised protection in states far away from the place where the contract is made. In this very case the policy was sold to the insured with knowledge that he could take his property anywhere in the world he saw fit without losing the protection of his insurance . . . Particularly since the company was licensed to do business in

> the forum state it must have known it might be sued there . . . 363 U.S. at 221, 80 S.Ct. at 1230.

Id. at 182.

The respondent contends that the factors that justified the application of the forum state's law in *Clay* are present in the case at bar and therefore support an affirmation of the Minnesota Supreme Court's decision. In both cases the insurer was licensed to and did conduct business in the forum state. Each insurance policy provided coverage for losses occurring throughout the United States. In the case at bar the Petitioner issued the policy with the expectation that the insured would drive beyond the territorial boundaries of the state in which the policy was issued. Therefore, in both cases the insurer knew that the circumstances were such that a suit based upon the policy might be brought in a state other than the place of contracting, and liability determined in accordance with that State's law.

An additional factor in support of the constitutionality of the choice of Minnesota law is the lack of reliance upon the application of Wisconsin law by the petitioner. Allstate did not attempt to restrict the interpretation of its coverage under the policy to the laws of the state of the policy's execution. In fact insurers do not attach great significance to the geographical boundaries in which their insureds will travel in setting automobile insurance premium rates. *See* Morris, *Enterprise Liability and the Actuarial Process - The Insignificance of Foresight*, 70 Yale L. J. 544 (1961); Peck, *Comparative Negligence in Automobile Liability Insurance*, 58 Mich. L. Rev. 689 (1960). Thus the petitioner cannot claim that the choice of Minnesota law contravenes its justified expectations or reliance upon Wisconsin law.

The petitioner contends that *Clay* is distinguishable since the loss did not occur in the forum state. This factor does not prevent the application of *Clay* to the case at bar since this Court has upheld the application of the forum state's law when the loss occurred in another state. *See Alaska Packers Assoc. v. Industrial Accident Comm'n*, 294 U.S. 532 (1935) (Application of the Workers' Compensation law of the forum state did not violate the Due Process and Full Faith and Credit Clauses of the Constitution when the worker, a non-resident, was employed in the forum state to work in another state where the injury was sustained). By stressing the fact that the accident did not occur in Minnesota, the petitioner implicitly argues that it will be denied Due Process unless the laws of the situs of the tort are applied. An expectation that Wisconsin laws should apply since it was the situs of the tort is not justified. Any expectations regarding which state's laws should apply must necessarily be formed at the time of the issuance of the policy. At that point in time, none of the circumstances of a loss is known and thus it is impossible for one to form any expectations. The only expectation that could arise at that point is that a loss could occur anywhere under circumstances that would justify application of the forum state's law. Likewise, justified expectations could not have arisen at the moment of the accident merely by looking to the situs of the tort as not all the relevant facts were then known.

Based upon a weighing of factors known, it is contended that Allstate was not denied its rights under the Constitution since the case involved an ambulatory contract, issued without any expectation as to the forum in which suit might be brought or the laws to which the policy would be subject. Thus, an insurer who by conducting business in the forum

state has enjoyed the benefit and protection of its laws and thus should not be permitted to object to the application of the forum state's law in a suit against the insurer. This last point was discussed by Justice Frankfurter in his concurring opinion in *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 74 (1954). Of importance to Justice Frankfurter was the fact that a state has the privilege of excluding a corporation from conducting business in the state. Therefore it follows that if the corporation is allowed to engage in business in the state it also becomes subject to regulation and its dealings must conform to the public policy of the host state.

Another area in which this Court has been faced with a Constitutional challenge to a forum state's choice of its law concerns Workers' Compensation. *See e.g., Pacific Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493 (1939) (Full Faith and Credit Clause did not preclude California from applying its own Workers' Compensation Act where a Massachusetts employee of a Massachusetts employer suffered an injury in California). The Court's opinion in *Pacific Employers* was discussed at length in the subsequent case of *Carroll v. Lanza*, 349 U.S. 408 (1955). Like *Pacific Employers*, *Carroll* dealt with a choice of law issue between two states' Workers' Compensation laws. In *Carroll v. Lanza*, the Supreme Court held that Arkansas, the place of injury, could, within the limits of the Full Faith and Credit Clause, allow recovery under its common law in spite of the fact that the Workers' Compensation Statute of Missouri, the State of employment, was designed to be the exclusive remedy. In discussing *Pacific Employers* the Court reasoned that, ". . . the Full Faith and Credit Clause does not require a state to substitute for its own statute, applicable to persons and events within it, the statute of another state reflecting a conflicting

and opposed policy." *Id.* at 412. *See Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 543 (1935).

The Workers' Compensation cases teach us that when the forum state has an interest in the litigation it is not compelled to apply the law of a sister state simply because the sister state has an interest in the matter being litigated and its law would be of controlling force if the matter were litigated there. In addition, when a litigant's challenge to the choice of a state's law is founded upon the Full Faith and Credit Clause that party assumes the burden of showing that the conflicting interests of the sister state are superior to those of the forum state. *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 547 (1935). Allstate has made no such showing.

B. MINNESOTA HAD AN IMPORTANT, AND CONSTITUTIONALLY PROTECTED INTEREST, IN THE APPLICATION OF ITS LAW IN THE PRESENT CASE.

In this case, Minnesota has a significant relationship to and interest in the issues and parties in this litigation: (1) this case concerns benefits payable to a widow, and the widow was domiciled in Minnesota at the time of suit; (2) the decedent, Ralph Hague, had worked for fifteen years in Minsota and had almost daily driven back and forth across the Minnesota-Wisconsin border to his employment in Minnesota; (3) Allstate does substantial business in Minnesota, and is clearly subject to the state's insurance regulations;* (4) the plaintiff is the personal representative of the decedent pur-

* According to the Minnesota Insurance Division, Allstate in 1978 collected 4.74% of all private passenger vehicle premiums. Allstate is the fourth largest automobile insurer in Minnesota.

suant to appointment of the Minnesota probate court, and the claim subject of this suit is the principal asset of the estate. *See Travelers Ins. Co. v. Davis,* 490 F.2d 536, 543 (3d Cir. 1974).

Petitioner's brief cites the cases of *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.,* 292 U.S. 143 (1934), and *Home Insurance Co. v. Dick,* 281 U.S. 397 (1930), in support of its contention that the choice of Minnesota law in the case at bar violated the Due Process and Full Faith and Credit Clauses of the Constitution. *Delta & Pine Land* has been questioned in previous opinions by this Court as to whether if brought before the Court to day it would result in the same decision. *Clay v. Sun Ins. Office Ltd.,* 363 U.S. 207, 220 (1960) (Justice Black's dissenting opinion in the first case); *Carroll v. Lanza,* 349 U.S. 408 (1955); *see Watson v. Employer Liab. Assurance Corp.,* 348 U.S. 66 (1954). On the other hand, in *Dick,* Texas had no discernible interest, a fact that is emphasized in Justice Brandeis' observation, 281 U.S. at 410, that if the real defendant in the case (the Mexican insurance company) had been doing business in Texas the case might have come out the other way.

Moreover the facts of *Dick* are distinguishable from the facts of the case at bar. In *Dick,* coverage under the insurance contract was limited to certain Mexican waters. In the case at bar the insurance contract covered the decedent or his vehicle throughout the United States, its territories and possessions or Canada. The importance of this difference was considered in *Watson v. Employers Liability Assurance Corp.,* 348 U.S. 66 (1954). In *Watson,* this Court recognized that under insurance contracts providing coverage for multi-state transactions each state involved may regulate the transaction in the manner which protects the interests of its people, including the choice of its own laws. *Id.* at 71-72. When compared to

Dick and *Watson*, the contract involved in the present action most closely resembles the contract construed in *Watson*. The contract did not insure the decedent while traveling only in Wisconsin. Like *Watson* it offered him coverage throughout the country and did not attempt to confine its coverage to Wisconsin's roads.

The second distinguishing factor between *Dick* and the case at bar is the commercial relationship between Allstate and the forum state. In *Dick*, the insurer "never was in Texas." 281 U.S. at 410. (Similarly in *Shaffer v. Heitner*, 433 U.S. 186, 213 (1977), plaintiff neither alleged nor claimed that defendants "ever set foot in Delaware"). In contrast, in the case at bar, Allstate maintains a commercial relationship with the forum state and its citizens. In fact, in this case Allstate concedes that Minnesota has properly obtained *in personam* jurisdiction over it. Brief of Petitioner at 6. Allstate is licensed to do business in Minnesota and maintains an office with agents in the state. Based upon this court's own language in *Dick* it is evident that *Dick* was not intended to serve as a precedent in cases where an insurer is licensed to and does conduct business in the forum state. See 281 U.S. at 410.

In support of its position, Allstate cites *John Hancock Life Insurance Co. v. Yates*, 299 U.S. 178 (1936). That case was decided under the Full Faith and Credit Clause before the Supreme Court embarked on the course of permitting the state courts to develop their own choice of law analysis, subject only to Due Process constraints. (See Part III of this Brief.)

C. THE RECENT JURISDICTION CASES IN THIS COURT SUPPORT APPLICATION OF MINNESOTA LAW IN THIS CASE.

Recent case law concerning the Due Process Clause has been formulated in the line of cases concerning the exercise of jurisdiction by states over non-resident defendants. While the issues of the constitutional limitations imposed upon states in respect to judicial jurisdiction and choice of law appear to be treated differently, this Court in several cases has recognized that since both issues deal with similar considerations it might be appropriate to subject them to a similar analytical framework. *See Shaffer v. Heitner*, 433 U.S. 186 (1977); see generally Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U.L. Rev. 33, 79-90 (1978).

While the trend appears to be that objections to a state's choice of law will be examined against this Court's recently enunciated jurisdictional standards, this Court has repeatedly said that a broader range of contacts and interests will sustain a state's choice of law. In *Hanson v. Denckla*, 357 U.S. 235 (1958), this Court held that Florida could not exercise jurisdiction over the trustee or the trust which had been established in Delaware since the Delaware Trust Company, apart from this trust, maintained no contacts with Florida. Even though the state could not exercise jurisdiction the court stated that there might well be a sufficient basis for the choice of the forum state's law. *Id.* at 253.

This dichotomy between jurisdiction and conflict of law recently was discussed in *Shaffer v. Heitner*, where the defendants' only contact with the forum state was the fact that the forum state deemed itself the situs of the shares of stock. In support of the exercise of jurisdiction, it was argued that

the forum state had a compelling interest in the case since the corporation was incorporated under its laws and the defendants as directors derived benefits from those laws; accordingly it would be reasonable to require the director to respond to a lawsuit brought in the forum state. While these factors were an insufficient basis under which the forum state could exercise jurisdiction they were deemed sufficient to permit the application of the laws of the forum state:

> [Plaintiff] notes that Delaware law provides substantial benefits to corporate officers and directors, and that these benefits were at least in part the incentive for appellants to assume their positions. It is, he says, "only fair and just" to require appellants in return for these benefits, to respond in the State of Delaware when they are accused of misusing their powers. . . .
>
> But like Heitner's first argument, this line of reasoning establishes only that it is appropriate for Delaware law to govern the obligations of appellants to Greyhound and its stockholders.

Id. at 215-16; *accord, Kulko v. Superior Court,* 436 U.S. 84, 98 (1978).

This analysis resembles the theory developed by Professor Weintraub. *See* Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law,* 44 Iowa L. Rev. 449 (1959). Professor Weintraub, in examining the contacts of the defendant with the state whose law is to be applied, looks to the justifiable expectations of the party, i.e., whether the application of the forum state's law, would "inject an element of unfair surprise." *Id.* at 457. Thus, under Weintraub's approach if a party has in the past sought the benefits of the laws of a state that party cannot object to a subsequent

application of that state's law against it on the basis of an alleged denial of due process. In this situation the minimum contacts with the state arise out of the prior reliance upon the state's laws. Therefore, the choice of Minnesota law in this case was constitutionally permissible since the petitioner conducts business in the forum state and issued the policy with the understanding that it might be subject to suit in Minnesota and have its liability determined under the laws of Minnesota. The result in this case did not amount to an "unfair surprise" to the petitioner, since its expectations must have included the belief that the policies might be stacked.

The suggestion has been made that this Court should impose the same standard in reviewing challenges to a state's choice of law as to a state's assertion of judicial jurisdiction. In his dissenting opinion in *Shaffer* Justice Brennan wrote:

> In either case an important linchpin is the extent of contacts between the controversy, the parties, and the forum state. While constitutional limitations on the choice of law are by no means settled . . . important considerations certainly include the expectancies of the parties and the fairness of governing the defendants' acts and behavior by rules of conduct created by a given jurisdiction. (citations omitted).

Id. at 225.

The standards referred to by Justice Brennan were established by the Court in the case of *International Shoe Co. v. Washington,* 326 U.S. 310 (1945). The Court in *International Shoe,* in determining whether due process had been satisfied,

looked to "the quality and nature of the activity in relation to the fair and orderly administration of the law . . ." *Id.* at 319. This was construed by the Court to mean that the exercise of jurisdiction is consistent with due process when the defendant has certain minimum contacts with the forum state so that maintenance of the suit does not violate the "traditional notions of fair play and substantial justice." *Milliken v. Meyer,* 311 U.S. 457, 463 (1940). In finding the exercise of jurisdiction over the defendant consistent with the Due Process Clause the Court held that when a party chooses to engage in commercial activities and enjoy the benefit of the protection of the state's laws, a companion obligation is incurred, namely the duty to respond to a suit in that state. *International Shoe,* 326 U.S. at 319.

This doctrine was reaffirmed in *World-Wide Volkswagen Corp. v. Woodson,* 100 S. Ct. 599 (1980). In *Woodson,* plaintiff named four defendants—the manufacturer (Audi), the importer (Volkswagen of North America), the regional distributor (World-Wide), and the local dealer (Seaway). This Court held that the latter two could not be subjected to suit in Oklahoma. Allstate in the present case, however, is not like the local dealer in Massena, N.Y., but rather, like Volkswagen of North America. It does extensive business in the forum state: as its very name implies, Allstate trades in substantial part on its presence throughout the United States and through the Sears, Roebuck catalog and retail stores, it avails itself of the benefits of the laws of all fifty states, including Minnesota. Based upon the nature of the petitioner's product it is evident that the policies were issued with the expectation that suit might be brought upon them in any state under circumstances which would warrant application of the forum state's law.

In *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957), California jurisdiction (and by clear implication application of California law) were held valid against an insurer who had fewer contacts with the forum state than does the petitioner in the case at bar. In *McGee*, the evidence disclosed that the insurer did not maintain any office or agents in the forum state and had never solicited or conducted any business in the forum state except for the one policy involved in the litigation. The Court held that the exercise of jurisdiction did not amount to a denial of due process since the policy had been delivered in the forum state to a resident who paid the insurance premiums in the forum state. If these contacts of the claimant were sufficient in *McGee* to satisfy the traditional notions of justice and fair play the contacts in the case at bar should be deemed sufficient to warrant affirmation of the Minnesota Supreme Court's decision. Here the Petitioner's expectation of suit in Minnesota was greater than the expectation of the insurer in *McGee* to a suit in California. Therefore when analyzed from this perspective Allstate by engaging in commercial activity and availing itself of the protection of the forum state's law became subject to suit in the forum state and the application of its laws. Thus Allstate should not now be permitted to claim that due process was denied to it by the Minnesota Supreme Court.

III. THIS COURT SHOULD BE RELUCTANT TO INTERVENE IN THE DEVELOPMENT OF CHOICE OF LAW DOCTRINES BY THE STATE COURTS.

This Court has long since rejected the notion that the Constitution requires the creation of a federal choice of law doctrine. After a brief period of attempt to control state choice of law rules (1918-1932), this Court has exercised only a minimum of oversight on the decisions of state courts to choose among the laws of the several states to be applied to any given case, once it is clear that the court in question has jurisdiction over the subject matter and the parties to the litigation. Indeed, the touchstone of the Supreme Court's decisions in the choice of law cases is that the due process clause poses a fairness limitation on the power of a state to apply its own law to parties with whose disputes it has virtually no connection, and in the outcome of which it has virtually no interest. The present case does not come within that category.

A. THERE IS NO ACCEPTABLE SOURCE FOR A SUPREME COURT CHOICE OF LAW DOCTRINE.

The decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) set the direction for modern conceptions of federalism, and placed limits on lawmaking by federal courts, including this Court. The import of the *Erie* doctrine in the present context is that conflict of laws rules, no less than rules concerning commercial law, statutes of limitation, or tort liability, are committed to the states, at least in the absence of federal statute. "[T]he prohibition declared in *Erie* . . . against . . . independent determinations [of the better rule of law] by the

federal courts, extends to the field of conflict of laws." *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941).

Of course, all adjudication in the United States is subject to the Constitution; however, as an independent source of law for deciding conflict of laws issues, neither Article III nor Article IV offers much guidance. The due process clause sets the outer limits, but does not provide a source for choosing among rules of jurisdictions which fall within those limits. Thus if this Court were to require a state court to, say, reject the views of Leflar or Currie in favor of those of Reese or Cavers,[1] it would be, in effect, drawing on the Constitution for a source that is not there.

Klaxon itself involved a federal court hearing an action based on diversity of citizenship. But if this Court was reluctant to permit the lower federal courts to exercise supervision over the choice of law process, it ought to be still more reluctant to exercise such supervision itself in its function of reviewing the work of the state courts. In other words, choice of law has not been—at least since 1938—a federal question. If the Court in the present case were to prescribe a particular choice of law to the Minnesota courts, it would open the door to the filing of hundreds of petitions for certiorari, each depending on some variation in contacts, expectations, preferences, or interests.

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[1] *Compare*, Leflar, *Choice-Influencing Considerations in Conflicts of Law*, 41 N.Y.U.L. Rev. 267 (1966) *and* Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 Duke L.J. 171, reprinted in B. Currie, *Selected Essays on the Conflict of Laws* (1963), *with* Reese, *Choice of Laws: Rules or Approach*, 57 Corn. L. Rev. 315 (1972) *and* D. Cavers, *The Choice-of-Law Process* (1965). *See also* R. Weintraub, *Commentary on the Conflict of Laws* 6-11 (2d ed. 1980).

B. THIS COURT SHOULD NOT FRUSTRATE EXPERIMENTATION IN CONFLICT OF LAWS THINKING AT THIS TIME.

A generation ago, Professor Paul A. Freund, in reviewing the work of Chief Justice Stone in the field of conflict of laws, wrote:

> [P]roblems in choice of law have not lent themselves to satisfactory solution as constitutional questions, and . . . in their nature they cannot be expected to . . . . If the task of Conflict of Laws is to understand, harmonize, and weigh competing interests in multistate events, and if the desideratum of uniformity will be approached most satisfactorily by evolving rules that deliberately seek these objectives, then we seem to be hardly ready for a set of precepts imposed in the process of Supreme Court decision as fixed canons of constitutional law.

Freund, *Chief Justice Stone & the Conflict of Laws*, 59 Harv. L. Rev. 1210, 1235-36 (1946).

A half generation ago, Judge Irving Kaufman, faced with the argument that the Constitution required application of the law of the place of an accident to the award of damages by the court of another forum, wrote:

> The field of conflict of laws, the most underdeveloped in our jurisprudence from a practical standpoint, is just now breaking loose from the ritualistic thinking of the last century. Recent opinions of the Supreme Court and the great wave of academic writing reinforce this trend toward flexible and articulate selection of the laws governing multistate transactions. The development will be stillborn if we impose inflexible constitutional strictures

> in the name of national unity, restrictions which could not be repaired by state or federal legislation.

Pearson v. Northeast Airlines, Inc., 309 F.2d 553, 563 (2d Cir. 1962) (en banc).

In the interval between Judge Kaufman's opinion and the present, the development that he predicted has gone on at a rapid pace.[2] If the Court were now to intervene in that development, it would either end the experimentation and signal the beginning of a new "Ice Age of conflict of laws jurisprudence," (See *Pearson*, 309 F.2d at 557), or it would invite each losing party in an interstate transport accident, or medical malpractice, or products liability litigation to come to this Court alleging violation of its due process rights.

C. THIS COURT HAS CONSISTENTLY REVERSED STATE AND LOWER FEDERAL COURTS WHICH SOUGHT TO IMPOSE CHOICE OF LAW RESTRAINTS IN RELIANCE ON THE CONSTITUTION.

In *New York Life Insurance Co. v. Dodge*, 246 U.S. 357 (1918), the U.S. Supreme Court reversed the Missouri Supreme Court which had applied Missouri law, and required the application of New York law to an insurance claim in which both states might be said to have been interested. That

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[2] *See e.g., Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965); *Macey v. Rozbicki*, 18 N.Y.2d 289, 221 N.E. 380, 274 N.Y.S.2d 591 (1966); *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969) *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972); *Towley v. King Arthur Rings, Inc.*, 40 N.Y.2d 129, 351 N.E.2d 728, 386 N.Y.S.2d 80 (1976). Justice Cardozo's observation, made well before the "conflicts explosion" of the 1960's has merely been borne out. Conflict of laws remains "one of the most baffling subjects of legal science." B. Cardozo, *The Paradoxes of Legal Science* 67 (1928).

effort was quickly rescinded, in *Mutual Life Insurance Co. of New York v. Liebing*, 259 U.S. 209 (1922).

In *Bradford Electric Light Co., Inc. v. Clapper*, 286 U.S. 145 (1932), the U.S. Supreme Court reversed the First Circuit Court of Appeals hearing a case brought in New Hampshire, and required that court to apply Vermont law to a claim by a Vermont employee against his Vermont employer arising out of a New Hampshire accident—again an action in which both states could be said to have an interest. That effort was also quickly rescinded, in *Pacific Employers Insurance Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939).

In *Watson v. Employers Liability Assurance Corp., Ltd.*, 348 U.S. 66 (1954) both the federal district court in Louisiana and the Court of Appeals for the Fifth Circuit thought they were bound by the Constitution to forbid Louisiana from applying its law to an interstate products liability case. This court reversed.

In *Carroll v. Lanza*, 349 U.S. 408 (1955), the Court of Appeals for the Fifth Circuit thought it was bound by the Constitution to apply Missouri law to a claim by a Missouri employee arising out of an accident in Arkansas. Again this Court reversed.

In *Clay v. Sun Insurance Office, Ltd.*, 377 U.S. 129 (1964), the Court of Appeals for the Fifth Circuit, even after being directed by this Court to seek the views of the Supreme Court of Florida as to which law it would have applied, 363 U.S. 207 (1960), thought it was bound by the Constitution to apply Illinois law to an insurance claim by a Florida resident based on an Illinois contract. Again, this Court reversed.

Finally, in *Nevada v. Hall*, 440 U.S. 410 (1979), (which seems to have been brought to this Court for reasons other

than the choice of law issue), the California Court of Appeal applied California law to an accident claim against the state of Nevada arising out of the operation of one of the state's vehicles in California. This Court affirmed.

In sum, (apart from two short-lived excursions) whenever state or lower federal courts thought they were obligated to apply a particular state's law, the Supreme Court reversed; whenever an interested state court exercised discretion in choosing the applicable law, this Court affirmed. Nothing in the present case justifies a departure from the attitude of the Supreme Court towards this aspect of our federal system.[3]

D. THE MANY VARIATIONS IN FACT PATTERNS DO NOT LEND THEMSELVES TO GENERALLY APPLICABLE PRINCIPLES OR GUIDELINES.

The suggestion is made in the preceding sections that this Court has been wise when it permitted freedom of choice of law, and has regretted it when it has imposed conformity on state or lower federal courts as to choice of law. A brief summary of some certiorari petitions filed over the past few years demonstrates the wisdom of this Court's past reluctance to intervene in developments in this area.

In *Bernhard v. Harrah's Club*, 16 Cal. 3d. 313, 546 P.2d 719, 128 Cal. Rptr. 215 (en banc), *cert. denied*, 429 U.S. 859 (1976), a defendant club owner in Nevada sought review in this Court from a decision of the California Supreme Court permitting recovery against him for an automobile accident

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[3] The only cases in which application of forum law has been barred [*Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934) and *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930)] have been those *rarae aves* where the relations among the parties, the forum, and the litigation were "thought to be too slight and too casual," or just plain "wholly lacking." *Clay v. Sun Insurance Office, Ltd.*, 377 U.S. at 182.

in California. His argument was that he had sold liquor in Nevada in circumstances where no liability would accrue to him under Nevada law. Under California law, one who sells liquor to intoxicated persons is liable to third parties for damages caused to them by the intoxicated persons. The liquor club in question was near the state border, and the owner had advertised in California, and made special efforts to attract California residents. The California Supreme Court upheld both jurisdiction over the club and application of California law. This Court denied review.

In *Blamey v. Brown*, 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 48 U.S.L.W. 3535 (Feb. 19, 1980), involving a Wisconsin liquor seller and a Minnesota accident, the facts were nearly the same as in *Bernhard*, except that the Wisconsin seller had made no effort, as the court found, to advertise in Minnesota or attract Minnesota residents. Again this Court denied review.

In *Schwartz v. Consolidated Freightways Corp. of Delaware*, 306 Minn. 564, 237 N.W.2d 385 (1975), *cert. denied sub. nom., Spector Freight System, Inc., of Illinois v. Schwartz*, 425 U.S. 959 (1976), plaintiff was the driver of a truck involved in a three-truck accident in Indiana. All three trucks belonged to companies that did business in Minnesota, but only plaintiff's company was a Minnesota corporation and only plaintiff himself was a Minnesota resident. In an action brought in Minnesota, the Supreme Court of that state applied Minnesota's comparative negligence rule in preference to the absolute bar for contributory negligence that prevailed in Indiana. The defendants sought review in this Court—again on full faith and credit and due process grounds. Hereto this Court denied review.

As these cases illustrate, choice of law in accident cases is not an area where a few well-chosen rules, or even guide-

lines, will suffice. Reversing the state court in the present case would not shed light on the others; and if certiorari had been granted in any of the others, the state (and lower federal) courts could not have drawn comfort from the Supreme Court's decision—at least absent some draconian return to the Ice Age of the First Restatement.[4] Each case has some facts of general application, and some unique ones. For instance in the present case, the decedent lived in one state, worked in the other, and his widow (plaintiff below) changed her domicile after the accident. In *Schwartz* both the plaintiff and the company that owned his truck were from the forum state, and all the trucks were owned by interstate carriers. In both *Bernhard,* and *Blamey,* the dram shop cases, the sellers were located near the state border, but one did, the other did not, engage in interstate solicitation. It is hard to see how any of these details rise to the dignity of a constitutional principle, to be enunciated by the Supreme Court with value beyond the case at hand.

IV. THE SUPREME COURT'S SUPERVISION OF THE EXERCISE OF JURISDICTION OVER ABSENT DEFENDANTS ADEQUATELY PROTECTS THE APPROPRIATE CONCERNS OF FAIRNESS IN A FEDERAL SYSTEM.

In the choice of law cases as well as the jurisdiction cases the major premise of all recent decisions has been that exercises of state court power must "not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945) [quoting *Milliken*

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[4] *See* American Law Institute, *Restatement of Conflict of Laws* (1934); *see also* J. H. Beale, *A Treatise on the Conflict of Laws,* (1935).

v. Meyer, 311 U.S. 457, 463 (1940)]. The fairness subsumed within those notions requires that a defendant be given adequate notice of suit, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); that he not be forced to bear the burden of litigating in a forum with which he lacks "minimum contacts", *World-Wide Volkswagen Corp. v. Woodson*, 100 S.Ct. 559 (1980); that he not suffer the consequences of having an unexpected law applied by a forum "wholly lacking" in contacts with the parties or interests in the outcome of the litigation, *Home Insurance Co. v. Dick;* and that he not be "haled before a . . . court" simply on the basis of owning stock in a corporation organized in the state of the forum, *Shaffer v. Heitner*, 433 U.S. 186 (1977), or on the basis of sending his child into the forum state, *Kulko v. Superior Court*, 435 U.S. 84 (1978). But none of these probems is present in this case.

A. RECENT CORRECTIONS OF JURISDICTIONAL ABERRATIONS HAVE SOLVED THE PROBLEM OF OVERREACHING BY STATE COURTS.

It is no accident that the leading—and almost the only—case in which this Court has struck down the application by a state court of its own law to an interstate transaction, *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930) is a case that could no longer be brought today. Texas had no real jurisdictional basis for hearing the action; indeed the issuer of the policy could not even be served in Texas, and the respondent was the garnishee, Home Insurance, whose obligation to reinsure was used as the hook to bring the suit before the Texas courts. *Home Insurance Co. v. Dick*, in other words, was an application (or even extension) of *Harris v. Balk*, 198 U.S. 215 (1905), and a precursor of *Seider v. Roth*, 17 N.Y.2d 111,

216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). After *Shaffer v. Heitner,* 433 U.S. 186 (1977), and *Rush v. Savchuk,* 100 S.Ct. 571 (1980), the situation in *Home Insurance* could not again arise.

In contrast, in *Watson v. Employers Liability Assurance Corp.,* as in the present case, there was no problem about jurisdiction over the defendant insurance company, which had qualified to do business and was doing business in the state.[5]

Again it is no accident that the most criticized choice of law cases in recent years—notably *Rosenthal v. Warren,* 475 F.2d 438 (2d Cir.) *cert. denied,* 414 U.S. 856 (1973), and *O'Connor v. Lee-Hy Paving Corp.,* 579 F.2d 194 (2d Cir.) *cert. denied,* 439 U.S. 1034 (1978), were also cases in which judicial jurisdiction was acquired in ways this Court has now disapproved, by "attachment" of insurance policies issued to out-of-state defendants by companies doing business in the state of the forum. As this Court noted in *Rush v. Savchuk,* 100 S.Ct. at 577, "[t]he legal fiction that assigns a situs to a debt . . . wherever the debtor is found" is not sufficient to establish jurisdiction over the person to whom the "debt" is owed; the plaintiff's residence cannot make up for the missing element connecting the defendant to the forum. But where both the defendant and the plaintiff are fairly before the court, the likelihood of overreaching by a state court is very much diminished. This is particularly true when the defendant is a nationwide insurance company, which expects to and derives custom from the fact that it is represented and handles claims in all fifty states. [Compare *World-Wide Volkswagen Corp. v. Woodson,* 100 S.Ct. 559 at 567 (majority opinion); at 569 (Marshall, J. dissenting); at 571 (Blackmun, J. dissenting)].

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[5] See p. 10 and accompanying footnote for statement of Allstate's operations in Minnesota.

B. APPLICATION OF A STATE'S LAW IN SUITS AGAINST INSURANCE COMPANIES IS AN IMPORTANT, FAIR, AND RATIONAL EXERCISE OF THE CHOICE OF LAW FUNCTION.

In *Minichiello v. Rosenberg*, 410 F.2d 106, (2d Cir.) *cert. denied*, 396 U.S. 844 (1969), the Court of Appeals for the Second Circuit sustained a *Seider v. Roth* action brought by an in-state resident claiming injuries from an out-of-state accident, on the grounds (1) that jurisdiction based on a garnishment of insurance policies was for all practical purposes like a direct action statute, citing *Watson v. Employers Liability Assurance Corp.*, and (2) that the Supreme Court would uphold direct action statutes either on the basis that the plaintiff was a resident of the forum state or that the injury had occurred in that state. The first conclusion of the Second Circuit has now been overturned, because a majority of this court was not prepared to treat a judge-made fiction as if it were the real thing. *Rush v. Savchuk.*

The other leg of the Second Circuit's reasoning, however, remains sound. It would be most unfortunate if the Court were now to cast doubt on the continuing validity of *Watson.* As Justice Black pointed out in *Watson* itself (348 U.S. at 72), the direct action statute was an important element in Louisiana's protection of its residents against injuries. Precisely because it may not be possible to obtain jurisdiction over the actual tortfeasor—Gillette in *Watson,* the uninsured motorist in the present case—the state has seen fit to impose obligations on insurance companies. This court should not, by prescribing choice of law rules derived from discarded emphasis on the *lex loci delicti,* frustrate the interests of states acting to protect their citizens from injury.

C. A COURT'S APPLICATION OF THE LAW OF ITS OWN STATE TO A CASE IN WHICH IT CLEARLY HAS JURISDICTION DOES NOT POSE THE THREAT TO FEDERALISM THAT CONCERNED THIS COURT IN *WORLD-WIDE VOLKSWAGEN* AND IN *SAVCHUK*.

In *World-Wide Volkswagen* this Court identified "two related, but distinguishable, functions" performed by the minimum contacts test in the jurisdictional cases. First, "[i]t protects the defendant against the burdens of litigating in a distant or inconvenient forum"; and second, "it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." 100 S. Ct. at 564. While the fairness function stands out in relief against the background of the choice of law cases as well, the federalism function has a much different role to play. Far from acting as an affirmative limit on a state's choice of law through the full faith and credit clause, the federalism concerns derived from *Erie* and *Klaxon* serve to *encourage* the states to be experimental laboratories in doctrinal construction. [*Cf.* Brandeis, J. dissenting in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)].[6]

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[6] The admonition of Mr. Justice Brandeis in that case deserves a quote in full:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because

As demonstrated above, this Court has squarely rejected the notion that the full faith and credit clause compels a forum state to give effect to the insurance recovery scheme of a sister state, even when to do so would contravene its own policies on recovery. *Compare Pacific Employers Ins. Co. v. Industrial Accident Comm'n,* 306 U.S. 493 (1939) *with Bradford Electric Light Co. v. Clapper,* 386 U.S. 145 (1932). The conclusion is that the exercise of jurisdictional power by one state over nonresidents may well offend the due process clause, but that application of forum law once the court validly has jurisdiction and expresses legitimate forum interests, offends neither federalism nor due process.

This Court's recent clarifications of the jurisdictional questions go a long way towards resolving the choice of law issue in the present case. The due process clause acts as a limitation on the power of states as coequal sovereigns, and also as a protective shield for defendants against unforeseeable and unreasonable exercises of state court power over their persons and their property.

But the due process clause is not a writ of error to the state courts, to correct them whenever they differ with this Court over which among several applicable laws is the better one to apply. A reversal in the present case runs the risk of converting the due process clause into just such a general writ of error. This Court should continue to use the due process clause only in harmony with its chief purpose, as a corrective over truly arbitrary governmental interference with private rights.

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the due process clause has been held by this Court applicable to matters of substantive law as well as matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

CONCLUSION

In *Hanson v. Denckla*, 357 U.S. 235 (1958), *Shaffer v. Heitner*, 433 U.S. 186 (1977), *World-Wide Volkswagen Corp. v. Woodson*, 100 S. Ct. 559 (1980), and *Rush v. Savchuk*, 100 S. Ct. 571 (1980), this Court said (over the dissent in the last three cases of Justice Brennan) that a relationship sufficient to support the application of a state's laws might not be sufficient to support the jurisdiction of the state's courts. Critics, led by Justice Brennan, have wondered why this should be so. Some have compared the contacts analysis of jurisdiction to the interest analysis of choice of law; some have said that jurisdiction depends only on the defendant, whereas choice of law may derive support from the relationship of the applicable law to both parties, the forum, and the cause of action. This court need not now write the last word on this question. It suffices to say that there is no present reason to depart from the distinction between choice of law and jurisdiction upheld by this Court in the past two decades, and to subject conflicts of law developments in the United States to control comparable to that exercised over jurisdiction of courts.

For the foregoing reasons respondent urges that this Court affirm the decision of the Minnesota Supreme Court.

Respectfully submitted,

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